U.S. Department of Labor

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Issue Date: 25 October 2006

Case No.: 2005-BLA-05341

In the Matter of

R. C.
Claimant

v.

BADGER COAL COMPANY
Employer/Self-Insured

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-in-Interest

Appearances:	R.S., Personal Representative For Claimant	KATHY L. SNYDER, Esq. For Employer

Before: ADELE HIGGINS ODEGARD
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901-945 ("the Act") and the regulations issued thereunder, which are found in Title 20 of the Code of Federal Regulations. Regulations referred to herein are contained in that Title.

Benefits under the Act are awarded to coal miners who are totally disabled within the meaning of the Act due to pneumoconiosis, or to the survivors of coal miners whose death was due to pneumoconiosis. Pneumoconiosis, commonly known as black lung, is a disease of the lungs resulting from coal dust inhalation.

On December 16, 2004, this case was referred to the Office of Administrative Law Judges for a formal hearing. Subsequently, on April 19, 2006, the case was assigned to me. The hearing was held before me in Morgantown, West Virginia on May 10, 2006, at which time the

parties had full opportunity to present evidence and argument. The decision that follows is based upon an analysis of the record, the arguments of the parties, and the applicable law.

I. ISSUES

The following issues are presented for adjudication:[1]

(1) whether the Employer is properly designated as the Responsible Operator;
(2) whether the Claim was timely filed;
(3) whether the Claimant has pneumoconiosis;
(4) whether his pneumoconiosis, if any, arose from coal mine employment;
(5) whether the Claimant is totally disabled; and
(6) whether the Claimant's total disability, if any, is due to pneumoconiosis.

II. PROCEDURAL BACKGROUND

The Claimant filed this claim for benefits on January 21, 2003 (DX 2).[2] On September 2, 2004, the District Director issued a proposed Decision and Order denying benefits (DX 44). On September 28, 2004, the Claimant, acting through his personal representative, requested revision of the Decision and Order, disagreeing with several findings, and also requested a hearing (DX 46).[3] The District Director denied the request for revision and forwarded the matter to the Office of Administrative Law Judges for hearing, per the Claimant's request (DX 49).

Prior to the hearing, in February 2005, the Employer filed a Motion to Dismiss it as the Responsible Operator. The basis for the Employer's Motion was that the Claimant had coal mine employment subsequent to his employment with the Employer.[4] According to the Employer's Motion, the Claimant was employed from 1979 to 1982 by Truck Owners, Inc., and worked as a truck driver hauling coal for that company. The Employer's Motion also asserted that an officer and incorporator of Truck Owners, Inc., was the Claimant's spouse. In March 2005, the Director filed an opposition to the motion, arguing that none of the Claimant's subsequent employers can be the responsible operator. Specifically, the Director asserted that Truck Owners, Inc. had been dissolved by court order in 1984 (DX 34); that it did not have appropriate insurance in 1982, the last date of the Claimant's employment (DX 26); and that the

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[1] The parties stipulated that the Claimant worked for the Employer for a period of three years, but otherwise were unable to stipulate to the length of the Claimant's coal mine employment. I find that the record supports this stipulation.

[2] The following abbreviations are used in this Opinion: "DX" refers to Director's Exhibits; "CX" refers to Claimant's Exhibits; "EX" refers to Employer's Exhibits; "T" refers to the transcript of the May 10, 2006 hearing.

[3] The personal representative submitted medical treatment records of the Claimant's recent hospitalization, which were rejected by the District Director because the administrative deadline for submission of evidence had passed (DX 49). Records pertaining to the Claimant's hospitalization were included in the Exhibits introduced at the hearing by the Employer (EX 8, 9, 10, 11, 12, 18, 19, 22).

[4] The Employer also filed a similar Motion to Dismiss with the District Director (DX 41).

Claimant, in deposition testimony, stated that he worked as a dispatcher for Truck Owners, Inc., and therefore was not engaged in coal mine employment (DX 19).

In February 2006, Administrative Law Judge (ALJ) Robert D. Kaplan, to whom this matter was then assigned, denied the Employer's Motion. ALJ Kaplan determined that the Employer's Motion constituted a motion for summary decision, pursuant to 29 C.F.R. § 18.40, and pointed out that a motion for summary decision cannot be granted if there is a genuine issue as to any material fact. ALJ Kaplan found that genuine issues of material fact existed regarding the status of the employers who employed the Claimant after his employment with the Employer.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Factual Background

The Claimant was born in 1930 and is, therefore, 76 years old. Throughout this Claim he has been assisted by his daughter, a non-lawyer, as a personal representative. The Claimant is married and has no dependents other than his spouse.

Records maintained by the Social Security Administration (DX 7) reflect that the Claimant was employed by the following employers for the dates specified:

Fred's Fix-It Shop, Philippi WV[5]	1Q-2Q 1948[6]
TA Scott Maytag Co., Philippi WV	3Q-4Q 1948
Tuckahoe Mining Co., Tuckahoe NY	4Q 1949-2Q 1950
Henckel Brothers Inc., Clarksburg WV	2Q-3Q 1950
Russ Concrete Co. Inc., Buckhannon WV	3Q 1950
Elk Coal Co., Ashland KY	3Q 1950
A.G. Trusler, Buckhannon WV	4Q 1951-1Q 1953; 3Q-4Q 1954; 2Q 1955; 4Q 1958 2Q-3Q 1959; 4Q 1960; 4Q 1961; 1Q-3Q 1962
E.I. DuPont de Nemours & Co., Wilmington DE	3Q 1952-2Q 1953
Youngstown Manufacturing Inc., Florence AL	1Q-4Q 1953
Charles Richardson, Rivesville WV	2Q-4Q 1955
Hoy Koon, Buckhannon WV	3Q-4Q 1955
Redstone Coal Mining, Inc., Clarksburg WV	2Q 1956
Cities Service Oil Co., New York NY	3Q 1956
Hoffman Chevrolet Co., Berkeley Springs WV	1Q 1957

[5] The location specified is the location reflected in the Social Security Administration records. It may not be the location at which the Claimant performed his job duties, but rather may be the office responsible for payroll deductions.

[6] "1Q" means first quarter of the calendar year specified (January-March); "2Q" means the second quarter (April-June), etc.

H H Elder & Son, Cairo WV	2Q-3Q 1957
Larosa Fuel Co., Clarksburg WV	4Q 1957
F C Cook & Co., Baltimore MD	4Q 1958
Equitable Resources Exploration Inc., Buckhannon WV	2Q 1959
Coleman & Gay, Inc., Buckhannon WV	2Q 1959-1Q 1961; 3Q 1961-3Q 1962
John B. Ward, Philippi WV	4Q 1961
Montgomery Trucking, Inc., Cleveland OH	3Q 1962-3Q 1963; 1Q 1964; 1Q 1965
Daniels Motor Freight Inc., Pittsburgh PA	2Q 1963
Pacific Coast Co., Bedford OH	1Q-3Q 1964; 1Q-2Q 1965
Service Transport Co., Ravenna OH	2Q-4Q 1965; 1Q, 3Q-4Q 1966; 1Q 1967
Custom Beverage Packers, Inc., Aurora OH	1Q-3Q 1966
A C E Freight Inc., West Middlesex PA	1Q-2Q 1967
K & K Builders, Philippi WV	3Q 1973
Gas Flow Service, Charleston WV	4Q 1973
Southern Ohio Coal Co., Pittsburgh PA	1Q-3Q 1974; 1Q 1975
Badger Coal Co., Lebanon VA	1Q 1975-3Q 1977; 1978[7]
United Mine Workers of America, Volga WV	3Q 1976
Tripple R Casto Trucking, Inc., Buckhannon WV	1978
Truck Owners, Inc., Buckhannon WV	1979-1982
Mendenilla Construction Co., Westminster MD	1987
John B. Ward Co., Bridgeport WV	1988; 1989
Summers Construction Co., Inc., Glenville WV	1992, 1993
A J Security, Volga WV	1992-1994

The Claimant's Social Security Administration Records also list self-employment income for the Claimant for the following years: 1954; 1956-1958; 1967-1973; 1982-1986; 1988; 1990.

In his Claim (DX 5), the Claimant asserted that the following employers and periods of employment involved coal mine employment or transportation of coal:

Tuckahoe Mining, Century WV	1948-1950[8]
Kaufman Strip Mining, Cassidy WV	1950-1952
A.G. Trusler Trucking, Buckhannon WV	1952-1956
Self Employed (Transportation of coal)	1956-1958

[7] After 1977, the Social Security Administration records do not reflect calendar quarters, but report income based on year alone.

[8] Although the Form CM-911a requested that the month and year of each period of employment be specified, the Claimant provided only years (not specific months).

Coleman & Gay, Buckhannon WV	1958-1962
Southern Ohio Coal Co., Fairmont WV	1973-1976
Pittston Coal AKA Badger Coal Co., Philippi WV	1976-1979
Truck Owners, Buckhannon WV	1979-1983
A J Security, Century WV (Security Guard at Mines)	1992-1994

In November 2003, the Claimant was deposed by the Employer in a telephone conference call (DX 19).[9] The Claimant's personal representative and an attorney from the Office of the Director were also present by telephone. In his deposition, the Claimant testified that he worked for Southern Ohio Coal Company for a little more than a year, and was exposed to coal dust. He testified also that he worked for Badger Coal Company for about three years, and was exposed to coal dust during that employment. The Claimant testified that he left Badger and worked as a driver for his own company, Tripple R Casto, for less than a year; then went to Truck Owners for three years, from 1979-1982. At Truck Owners, the Claimant testified, he was a dispatcher. Truck Owners had a contract with Badger to haul coal and stone. Truck Owners had two employees: the Claimant and a second individual. Truck Owners had one truck, and the other individual was the driver. The corporate officers for Truck Owners were the wives of the two employees: that is, the Claimant's wife and the driver's wife. The Claimant asserted that he did not drive a truck for Truck Owners, and was not exposed to coal dust in his work for that company, and that his assertions in his Claim form that he did drive a truck and was exposed to coal dust were "a mistake" (DX 19). Additionally, the Claimant testified in his deposition that he first went to a doctor about his breathing problems in the early 1980s, but was never told by a doctor that he had black lung when he was worked at Badger or Truck Owners. He filed for black lung benefits in 1985 or 1986 but was told he did not have black lung. The Claimant also testified that Truck Owners had worker compensation insurance to cover black lung, but only for the driver; that the company went bankrupt, and that the company filed for bankruptcy.

In response to questions from the representative of the Director, the Claimant stated that he was exposed to coal dust for only a few minutes a day when working for Truck Owners. He also clarified that he was unsure whether the company had insurance coverage specifically for black lung. In response to additional questions from the Employer regarding his employment as a security guard at A J Security, the Claimant testified that he worked irregularly, filling in for other people. His guard station was located at the fence to an underground mine site, about 300 feet from the portal into the mine. He worked only the midnight shift, so there was no truck traffic passing his station (DX 19).

Except as noted above, the Claimant was not asked questions regarding his coal mine employment at the deposition.

In August 2004, during the administrative processing of his Claim, the District Director wrote to the Claimant. Based on his deposition testimony, in which the Claimant asserted that he had worked as a dispatcher for Truck Owners, Inc. and did not haul coal, the Director asked the Claimant to clarify whether he drove a coal truck for Truck Owners, and to explain why he

[9] The Employer submitted the deposition transcript to the District Director in December 2003.

changed his assertions. The Director also asked the Claimant to indicate whether his last coal mine employment was with Truck Owners or with Badger Coal Company (DX 42).

The Claimant responded to the Director that same month (DX 24). In his response, he stated that he misunderstood the question on the claim form about his job duties for Truck Owners, and so had responded with what the company did, rather than what he did. He stated that he did not haul coal for Truck Owners but was a dispatcher, and asserted that he had minimal contact with coal dust ("30 seconds per day," in his words). The Claimant also stated: "My last coal mine job where I was exposed to coal dust was with Badger Coal Company hauling, loading and shoveling coal" (DX 24 at 1).

B. Claimant's Testimony

The Claimant testified under oath at the hearing. He testified that his work at Badger Coal Company involved contact with a lot of coal dust. He stated that he quit Badger because he couldn't take the dust (T. at 47).

The Claimant testified that he started in the mines in 1948, when he was 18 years old. He worked for that company on a strip mine for about two years. Then he bought a truck of his own and hauled coal in his own truck. In 1962, he left the coal fields and went to Ohio, where he drove a truck in which he hauled steel, until 1973. He returned to West Virginia and went into the coal field for Southern Ohio Coal and worked there approximately 18 months; then, he testified he was offered a job with Badger Coal closer to home, so he took that job. He worked there for several years and then left the coal industry and went to work at Truck Owners as a supervisor. The Claimant testified that from 1948 to 1979, except for 11 years in Ohio, he was "in the coal field" (T. at 47-48).

In his testimony, the Claimant reiterated that he did not drive a truck for Truck Owners, and stated that Truck Owners had a contract with Badger to haul coal. In response to my questions about his coal mine employment, the Claimant stated that he worked in the coal fields for a total of 10 to 12 years before he went to Ohio in 1962, and that some of that time he was hauling raw coal, working for himself (T. at 49-52).

The Claimant testified that he started having trouble with his breathing when he worked for Badger, because there was so much dust. He had been hospitalized several times in the past few years, and had a heart attack in September 2004 (T. at 53-54). In response to questions from the Employer, the Claimant testified that he saw a doctor for breathing problems in the 1970s and was prescribed an inhaler. The Claimant stated that the doctor never told him he had black lung, and also stated that he didn't recall any doctor ever telling him he had black lung (T. at 56-57).

The Claimant testified that he had been a smoker in the past, but had quit. He started smoking at age 17 or 18, had smoked off and on, and quit quite a while ago (T. at 58-59). He reiterated that he was not exposed to coal dust in his employment as a mine security guard (T. at 61). Except for a period of several months, the Claimant testified, all of his coal mine employment was above ground (T. at 62).

In response to additional questioning from the Employer regarding his history of coal mine employment [DX 5], the Claimant stated that he did not fill out the form listing employment in his Claim himself, but acknowledged that he signed the form (T. at 66). In response to questioning from the Employer about a Coal Truck Driver Questionnaire submitted to the Department of Labor [DX 22], the Claimant testified that he filled the form out wrong when he stated that his job duties for Truck Owners included hauling coal from the stock pile to tipple (T. at 66-67). In response to questioning from the Employer about a questionnaire for Acordia Employers Service [DX 34], the Claimant acknowledged his signature, but stated that the form was wrong when it stated that he was a truck driver for Truck Owners (T. at 68). The Claimant did not directly respond when asked about whether he told the physician who conducted the evaluation for the Department of Labor that he drove a truck for Truck Owners (T. at 71).

In response to additional questions from his personal representative, the Claimant testified that he has a terrible time breathing and is not able to work (T. at 77). Responding to my questions, the Claimant stated that he knew as a fact that Badger had a contract with Truck Owners to haul coal. The Claimant testified that he did not personally sign any of the contracts, but the corporate officers, who were his wife and the wife of the truck driver, signed contracts with the United Mine Workers (T. at 78-80). In response to cross-examination from the Employer, the Claimant stated that Badger informed him of what hauling needed to be done, and then Truck Owners took care of the rest. His paychecks came from Truck Owners (T. at 80-82).

C. Responsible Operator

The Act states that the Secretary of Labor shall by regulation establish standards for apportioning liability for benefits among more than one operator, when such apportionment is appropriate. 30 U.S.C. § 932(h). The term "operator" is defined in § 725.491(a) as "(1) Any owner, lessee, or other person who operates, controls, or supervises a coal mine, or any independent contractor performing services or construction at such mine; or (2) Any other person who: … (iii) paid wages or a salary, or provided other benefits, to an individual in exchange for work as a miner….".

The Employer does not contest that it is an operator under the Act and the governing regulations. Rather, its position is that it is not the responsible operator, because the Claimant's employment with Truck Owners was more recent than his employment with the Employer. Moreover, the Employer asserts, despite Claimant's attestations to the contrary, the Claimant drove a coal truck for Truck Owners and such work constituted coal mine employment, as defined in the regulation. See Employer's Post-hearing brief.

In response, the Director, Office of Workers' Compensation Programs, U.S. Department of Labor, asserted that Truck Owners could not be designated as the responsible operator because the company was not insured on the date of the Claimant's last employment, and had been dissolved by court order in 1984. In any event, asserted the Director, the evidence was that the Claimant worked for Truck Owners as a dispatcher and was not exposed to coal dust, so this service did not constitute coal mine employment. See Director's Post-hearing brief. The

Claimant also asserted that the Employer was the responsible operator, for essentially the same reasons the Director articulated. See Claimant's post-hearing brief.

According to the Claimant's Social Security records (DX 7), he was employed by the Employer from 1975 through 1978, and was employed by Truck Owners from 1979 through 1982. In 1978, according to the Social Security Administration records, the Claimant also was employed by "Tripple R Casto Trucking Inc.," and earned approximately $8,500.

A discussion of whether the Employer should be considered the responsible operator must begin with an analysis of the applicable regulation. Because § 725.495 states that the operator responsible for the payment of benefits shall be the potentially liable operator that most recently employed the miner, the designation of "responsible operator" is thereby limited to those entities which may be designated as "potentially liable operators." Section 725.494 discusses "potentially liable operators." A "potentially liable operator" must have been an operator for any period after June 1973 (§ 725.494(b)); must have employed the miner for a cumulative period of not less than one year (§ 725.494(c)); must have employed the miner for at least one day after December 1969 (§ 725.494(d)); and must be capable of assuming financial liability for the payment of benefits (§ 725.494(e)). The latter condition is established if the operator had insurance for the time period covering the miner's employment; if the operator qualified as a self-insurer and still has sufficient assets to self-insure or secure the payment of benefits; or if the operator possesses sufficient assets to secure the payment of benefits. Id. An officer of a corporation is not considered an "operator." § 725.491(b).

The evidence reflects that Truck Owners was indeed an operator, within the definition of the regulation, because it contracted to provide mine services (coal hauling) at mine sites. As noted above, Truck Owners employed the Claimant between 1979 and 1982. The record reflects that Truck Owners was not insured as of the last date of the Claimant's employment, in 1982 (DX 26). The record also reflects that the company was dissolved by Court order in 1984 (DX 34).

Consequently, because Truck Owners cannot demonstrate adequate financial responsibility, as required by § 725.494(e), although Truck Owners was indeed the Claimant's employer for more than a year, it cannot be named as a "potentially liable operator" under the governing regulations. This same conclusion applies, whether or not the Claimant was engaged in coal mine employment as a Truck Owners employee.

Therefore, it was necessary to examine the Employer, as well as other potentially liable operators, to determine which employer should be named as the responsible operator. As § 725.495(a)(3) states: "If the operator that most recently employed the miner may not be considered a potentially liable operator, as determined in accordance with § 725.494, the responsible operator shall be the potentially liable operator that next most recently employed the miner. Any potentially liable operator that employed the miner for at least one day after December 31, 1969 may be deemed the responsible operator if no more recent employer may be considered a potentially liable operator."

Incidentally, I find that there is no other employer, after 1977, who could be considered the responsible operator. The Claimant worked for Tripple R Casto Trucking, Inc. in 1978.

According to his employment history statement, the Claimant hauled coal and was exposed to coal dust. According to the Social Security Administration, the Claimant earned just over $8,500. that year. The evidence of record is that the Claimant did not work a full year for Tripple R Casto, because he also worked for the Employer for at least part of that year. Moreover, the amount of the Claimant's earnings with Tripple R Casto was less than the industry standard, which for that year was $10,038., so a full year of employment with that company cannot be inferred. § 725.101(a)(32). See DX 8.

With one exception, the Claimant's work from 1983 to 1994, when he stopped working, did not involve the coal mine industry at all. The exception relates to his final job as a security guard for the A J Security Company at a mine site. In his recitation of employment history completed in conjunction with his claim the Claimant initially asserted that this work, which was from 1992 to 1994, involved exposure to coal dust (DX 5).[10] Presuming that A J Security Company was an "operator" within the definition of the regulation, and assuming arguendo further that the Claimant was exposed to coal dust in this employment, the Claimant did not work for this employer for a sufficient period of time for this employer to be deemed a responsible operator. The Social Security Administration records list an aggregate of less than $2,000. for the three years of the Claimant's employment (DX 7). Consequently, because A J Security Company employed the Claimant for an aggregate of far less than one year, this employer cannot be considered the responsible operator. See § 725.101(a)(32).

The Employer is the potentially liable operator that most recently employed the Claimant, prior to his employment with Truck Owners. It employed the Claimant for a little more than three years, well more than the one-year period required in § 725.494, and employed the Claimant after 1969. The Employer meets the other criteria for being designated as the responsible operator. Based on the foregoing, I find that the Employer was appropriately designated as the Responsible Operator in this matter, in accordance with § 725.495, and that the Employer's designation is supported by the evidence of record.

D. Length of Coal Mine Employment

As noted above, the Claimant's claim alleges well over 20 years of coal mine employment (1948-1962; 1973-1983; 1992-1994). His recitation of his employment history accompanying his claim states that he worked hauling coal for Truck Owners between 1979 and 1983, and that he worked as a security guard at a mine between 1992 and 1994, and that in both of these positions he was exposed to coal dust. In his deposition and his hearing testimony, the Claimant stated that he was not exposed to coal dust and disclaimed that he was employed as a truck driver while he was employed by Truck Owners, which (according to the Claimant's Social Security records) was 1979-1982. The Claimant also testified that his work as a security guard was intermittent, and did not involve exposure to coal mine dust. The record in this matter reflects that the Claimant changed his position regarding the nature of his work for Truck

[10] However, in his deposition testimony and his hearing testimony, the Claimant disclaimed any exposure to coal dust, stating that his work station was well away from the mine portal and there was minimal coal truck traffic past his station, because he worked the midnight shift. The issue of whether this employment constitutes coal mine employment is addressed below.

Owners between the time he filed his claim, in January 2003, and his deposition, in November of that year. In a letter to the District Director, in August 2004, the Claimant stated that his initial assertion was a "mistake" (DX 24). The Claimant also changed his position regarding whether his work as a security guard involved exposure to coal dust at his deposition. At that time, he claimed that he was not exposed to coal mine dust in his security guard work (DX 19).

Section 718.301 provides that the length of a miner's coal mine work history must be computed in accordance with § 725.101(a)(32). This latter provision states that a "year" means a period of one calendar year, or partial periods totaling one year, during which the miner worked at least 125 "working days" in or around coal mines. To the extent that evidence permits, the beginning and ending dates of such employment shall be ascertained. Dates and length of employment may be established by any credible evidence. If the evidence is insufficient to establish the beginning and ending dates of the employment, or the employment lasted less than a calendar year, then the yearly income from work as a miner may be divided by the average daily earnings for that year, as reported by the Bureau of Labor Statistics.

The Claimant provided only minimal information regarding the identities of his employers, the dates of his work, and the nature of his job duties in his claim. Below is set out the Claimant's assertion, from his claim, of his coal mine employment. In italics below each entry is the amount the Claimant earned in each year, based on Social Security Administration records, rounded to the nearest dollar.

Tuckahoe Mining, Century WV 1948-1950
1949: $380; 1950: $419
Kaufman Strip Mining, Cassidy WV 1950-1952
1950: $130[11]
A.G. Trusler Trucking, Buckhannon WV 1952-1956[12]
1951: $715; 1952: $2,040; 1953: $600; 1954: $768; 1955: $208[13]
Self Employed (Transportation of coal) 1956-1958
1956: $3,521; 1957: $ 1,415; 1958: $1,900
Coleman & Gay, Buckhannon WV 1958-1962
1959: $2,210: 1960: $3,611; 1961: $1,868; 1962: $2,286
Southern Ohio Coal Co., Fairmont WV 1973-1976
1974: $9,909; 1975: $3,924
Pittston Coal AKA Badger Coal Co., Philippi WV 1976-1979
1975: $13, 042; 1976: $14, 775; 1977: $15, 725; 1978: $1,379

As the information above reveals, the Claimant's work history does not reflect more than 20 years of uninterrupted coal mine employment. Indeed, for most years, the Claimant's

[11] The Social Security Administration recorded the employer as "Elk Coal Co., Inc"; there is no report of earnings from Kaufman Strip Mining in the Social Security Administration record.
[12] The Claimant's Social Security Administration records also reflect earnings of $146 in 1956, at the Redstone Coal Mining Co., that the Claimant did not report on his claim.
[13] Social Security Administration records list additional earnings from this employer as follows: 1958: $500; 1959: $121; 1960: $96; 1961: $30; 1962: $121.

earnings were insufficient for him to be credited with a full year of employment, based on the Bureau of Labor Statistics method outlined in § 725.101(a)(32). Based on that method, during the administrative processing of this claim the District Director credited the Claimant with a total of 8.59 years of coal mine employment (DX 8). The District Director credited the Claimant for the following years, in the amounts indicated:

1949	0.25
1950	0.34
1956	0.06
1959	0.75
1960	1.00
1961	0.71
1962	0.75
1974	0.75
1975	1.00
1976	1.00
1977	1.00
1978	0.98

The District Director did not credit the Claimant with coal mine employment for his employment with A.G. Trusler Trucking, or for his reported self-employment, which occurred between 1951 and 1958.

I find that the District Director's calculations regarding the Claimant's coal mine employment are correct. Additionally, I find that the evidence of record is insufficient for me to credit the Claimant with coal mine employment for the years between 1951 and 1958, inclusive, which involve his employment with A. G. Trusler Trucking and his self-employment. It is clear from an examination of the Claimant's claim, as compared with the Social Security Administration records, that the Claimant overstated the length of his coal mine employment, and he overstated the nature of his exposure to coal mine dust. Consequently, I am unable to credit the Claimant with coal mine employment for these time periods, based solely on his assertions. There is no evidence of record, other than the Claimant's own statements, for these periods of employment.

I also find that the Claimant was not engaged in coal mine employment, as defined in the regulation, while employed at Truck Owners or at A J Security, in the years 1979-1982 and 1992-1994. From the evidence of record, including my observation of the Claimant and his demeanor at the hearing, I do not find that the Claimant's testimony at the hearing regarding the nature of his duties with Truck Owners was false. At the hearing, the Claimant asserted that he was not exposed to coal dust while working for Truck Owners, and that he was a dispatcher, not a coal truck driver, for that company. It was, however, consistent with the Claimant's actions regarding his employment history for him to have misstated the nature of his employment with Truck Owners at the time he filed his claim. Asserting that he did in fact drive a coal truck order would inflate his years of coal mine employment, which would be consistent with the Claimant's practice in overstating his other employment, in conjunction with this claim.

Based on the foregoing, therefore, I find that the Claimant has established that he has 8.59 years of coal mine employment.

E. Timeliness of the Claimant's Claim

A claim for benefits must be filed within three years after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner. § 725.308(a). There is a rebuttable presumption that every claim for benefits is timely filed. § 725.308(c). In this case the Employer has controverted the timeliness of the Claimant's filing of his claim (DX 51; T. at 42).

There is no evidence of record establishing that the Claimant was informed that he was totally disabled due to pneumoconiosis more than three years prior to the date this claim was filed, which was in 2003. The record contains the Claimant's responses to interrogatories in which the Claimant stated that in 1986 he was checked for black lung and filed a state claim, which was denied (DX 20). These responses do not reflect that the Claimant was informed he was totally disabled from black lung at that time. At the hearing the Claimant testified that he did not recall being told by a physician that he had black lung (T. at 57).

Based on the foregoing, there is insufficient evidence to rebut the presumption that the Claimant's claim was timely. Consequently, I find that the Claimant's claim was timely filed.

F. Relevant Medical Evidence

In May 2003, Dr. John Bellotte conducted the full pulmonary evaluation required in conjunction with the Claimant's claim. See § 725.406. Dr. Bellotte conducted a physical examination of the Claimant, took a medical and work history, and administered a chest X-ray, pulmonary function tests, and arterial blood gas tests. Dr. Bellotte submitted a written report summarizing his findings (DX 13, 14, 15, 16, 17).

The Claimant presented X-ray interpretations of the Claimant's X-ray of May 19, 2003 [5/19/2003] by Dr. Afzal Ahmed (CX 1) and Dr. Thomas Miller (CX 2). This was the X-ray administered under Dr. Bellotte's supervision as part of the Claimant's pulmonary evaluation. In addition, the Claimant presented treatment records and a medical report from Dr. Salam Rajjoub, the Claimant's treating physician, dated April 2006 (CX 3 and 4).

The Employer presented medical reports from Dr. Joseph Renn (EX 6, 7) and Dr. James Castle (EX 20, 21), as well as deposition testimony from these physicians (EX 24; 25 [Dr. Renn]; EX 23 [Dr. Castle]). In its affirmative case, the Employer proffered interpretations of the Claimant's X-ray of 5/19/2003 by Dr. Ralph Shipley (EX 13, 15) and Dr. Jerome Wiot (DX 19, EX 15). In rebuttal of the Claimant's case, the Employer proffered an interpretation of the Claimant's 5/19/2003 X-ray by Dr. Charles Perme (EX 4, 7).

In its affirmative case, the Employer offered pulmonary function and arterial blood gas studies conducted on the Claimant in 1986 in conjunction with his state pneumoconiosis claim (DX 20). In rebuttal of the pulmonary function test performed on 5/19/2003 under Dr. Bellotte's

supervision in conjunction with the Claimant's claim, the Employer offered a statement from Dr. Castle critiquing the test, and concluding that the test was not reliable (EX 17). As "other medical evidence," under § 718.107, the Employer offered an interpretation of a CT scan, dated September 2004, by Dr. Wiot (EX 14). The Employer also offered the deposition transcript of a deposition conducted of Dr. Frank A. Scattaregia in February 2004 (EX 5). Dr. Scattaregia was the Claimant's former treating physician. Medical treatment records pertaining to the Claimant were included as exhibits in that deposition, and Dr. Scattaregia was questioned about his medical treatment of the Claimant.

Based on § 724.414(a)(4), the Employer offered records of the Claimant's hospitalizations and medical treatment (EX 1, 2, 3, 8, 9, 10, 11, 12, 18, 19, and 22). Except for Exhibits 1 through 3, these records covered the Claimant's medical treatment in September 2004.

These items will be discussed in greater detail below.

G. Admissibility of Medical Evidence

As noted above, the Employer offered, and I admitted, pursuant to § 718.107, Dr. Wiot's review, dated September 2005, of a CT scan of the Claimant's chest, conducted in September 2004 in conjunction with the Claimant's medical treatment (EX 14). See T. at 31-33. Dr. Wiot is a Board-certified radiologist and a B reader (EX 15). The Employer also submitted corresponding medical treatment records for the date and facility in question (EX 8, 12, 22), but these records do not contain any report of a CT scan of the Claimant's lungs.

Section 718.107(a) permits a party to offer "The results of any medically acceptable test or procedure reported by a physician and not addressed in this subpart, which tends to demonstrate the presence or absence of pneumoconiosis, the sequelae of pneumoconiosis or a respiratory or pulmonary impairment…". The Benefits Review Board has held that a party may submit the results of one such test, as part of its affirmative case. Webber v. Peabody Coal Co., BRB No. 05-0335 BLA (Jan. 27, 2006)(en banc). The Benefits Review Board also has held that it is improper for a party to submit evidence to rebut medical or hospitalization treatment records. Henley v. Cowin & Co., Inc., BRB No. 05-0788 BLA and 05-0788 BLA-S (May 30, 2006).

Because there is no corresponding report of a CT test in the medical records of the Claimant submitted in this case, I find that the Employer has proffered the CT scan test as part of its affirmative case. Therefore, it is properly admitted under § 718.107. However, because it is unclear, from the report itself, whether the purpose of the test was to examine the Claimant's lungs for evidence of pulmonary or respiratory impairment or had some other medical purpose, I give the CT test report negligible weight.

The Employer also proffered, and I admitted, deposition testimony of Dr. Frank Scattaregia (EX 5) (T. at 28). Dr. Scattaregia was a former treating physician of the Claimant, and he began treating the Claimant about 1998 (T. at 28). Attached as exhibits to the deposition transcript are treatment notes pertaining to the Claimant's treatment, as well as an X-ray interpretation, pulmonary function test results, and arterial blood gas test results. At the time of

the deposition, in February 2004, Dr. Scattaregia was still the Claimant's physician (EX 5 at 6). Neither the Claimant nor his representative was present at Dr. Scattaregia's deposition (T. at 26-27).

Neither party submitted a medical report from Dr. Scattaregia. Dr. Scattaregia's treatment records and notes may be properly admitted as medical treatment records under § 725.414(a)(4). However, there is no regulatory authority permitting admission of deposition testimony from a treating physician from whom there is no medical report. See Gilbert v. Consolidation Coal Co., BRB No. 04-0672 BLA; 04-0672 BLA-A (May 31, 2005). There is also no regulatory authority permitting the employer to submit rebuttal to medical treatment records. Henley v. Cowin & Co., Inc., BRB No. 05-0788 BLA; 05-0788 BLA-S (May 30, 2006). Section 725.414(c) permits the admission of testimony, by deposition or otherwise, of physicians who prepared medical reports. Under § 725.414(a)(3)(i), the responsible operator is authorized to submit up to two medical reports in its affirmative case. In this case, the responsible operator submitted medical reports from Dr. Renn and Dr. Castle, and also submitted deposition transcripts from both of them.

In this matter, therefore, it was improper for me to admit the deposition transcript of Dr. Scattaregia.[14] He did not author a medical report, so his testimony cannot fall within § 725.414(c). Moreover, if Dr. Scattaregia's treatment notes and medical test results were to be construed as a medical report under § 725.414(a)(1), then the Employer has exceeded the regulatory limits for medical reports. Consequently, I will disregard Dr. Scattaregia's deposition testimony. It is not improper for me to admit Dr. Scattaregia's treatment notes and medical test report results; these are admissible as medical treatment records under § 725.414(a)(4), and they are therefore admitted.

H. Entitlement

Because this claim was filed after January 19, 2001, the Claimant's entitlement to benefits is evaluated under the revised regulations set forth at 20 C.F. R. Part 718. The Act provides for benefits for miners who are totally disabled due to pneumoconiosis. § 718.204(a). In order to establish an entitlement to benefits under Part 718, the Claimant bears the burden to establish the following elements by a preponderance of the evidence: (1) the miner suffers from pneumoconiosis; (2) the pneumoconiosis arose out of coal mine employment; (3) the miner is totally disabled: and (4) the miner's total disability is caused by pneumoconiosis. Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994).

[14] Indeed, it is not clear whether Dr. Scattaregia was authorized by his patient, the Claimant, to testify at a deposition in the first place. I note that neither the Claimant nor his personal representative was present at the deposition, and at the hearing the Claimant's personal representative stated that she was unaware she could be present (T. at 27). Although the deposition transcript reflects that Dr. Scattaregia's treatment records were provided in conjunction with a release the Claimant provided, the transcript does not mention that the release permitted Dr. Scattaregia to provide testimony, and no copy of the release is attached as a deposition exhibit.

1. Elements of Entitlement:

Pneumoconiosis Defined:

Section 718.201(a) defines pneumoconiosis as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." This definition includes both medical or "clinical" pneumoconiosis, and statutory, or "legal" pneumoconiosis, which themselves are defined in that subparagraph at (1) and (2). "Clinical" pneumoconiosis consists of diseases recognized by the medical community as pneumoconioses, characterized by permanent deposition of substantial amounts of particulates in the lungs, and the fibrotic reaction of the lung tissue, caused by dust exposure in coal mine employment. "Legal" pneumoconiosis includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. Further, § 718.201(b) states: "a disease 'arising out of coal mine employment' includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment."

a. Whether the Claimant has Pneumoconiosis

There are four means of establishing the existence of pneumoconiosis, set forth at §§ 718.202(a)(1) through (a)(4):

(1) X-ray evidence: § 718.202(a)(1).
(2) Biopsy or autopsy evidence: § 718.202(a)(2).
(3) Regulatory presumptions: § 718.202(a)(3).[15]
(4) Physician opinion based upon objective medical evidence: § 718.202(a)(4).

[15] These are as follows: (a) An irrebutable presumption of total disability due to pneumoconiosis if there is evidence of complicated pneumoconiosis (§ 718.304); (b) where the claim was filed before January 1, 1982, there is a rebuttable presumption of total disability due to pneumoconiosis if the miner has proven fifteen (15) years of coal mine employment and there is other evidence demonstrating the existence of totally disabling respiratory or pulmonary impairment (§ 718.305); or (c) a rebuttable presumption of entitlement applicable to cases where the miner died on or before March 1, 1978 and was employed in one or more coal mines prior to June 30, 1971 (§ 718.306).

X-ray Evidence

The current record contains the following chest X-ray evidence:[16]

Date of X-Ray	Date Read	Ex.No.	Physician	Radiological Credentials[17]	Interpretation
5/19/2003	5/19/2003	DX 17	Bellotte	B reader	Neg. for pneumoconiosis: possible old granulamatous lung disease
5/19/2003	11/05/2003	DX 19	Wiot	BCR, B reader	Neg. for pneumoconiosis; calcified granulomas
5/19/2003	2/16/2004	CX 1; DX 21	Ahmed	BCR, B reader	ILO: 1/0 (6 zones)
5/19/2003	2/18/2004	CX 2	Miller	BCR, B reader[18]	ILO: 1/0 (6 zones)
5/19/2003	11/17/2003	EX 4	Perme	BCR, B reader	Neg. for pneumoconiosis; old granulomatous disease (lymph nodes in right hilum)
5/19/2003	11/14/2003	EX 13	Shipley	BCR, B reader	Neg. for pneumoconiosis; calcified granulomas
10/28/2003	11/18/2003	EX 5	Simone[19]	BCR, B reader	Neg. for pneumoconiosis; calcified hilar nodes, presumably from prior

[16] The record in this matter also contains other X-ray interpretations, relating to X-rays administered in the course of the Claimant's medical treatment (see, e.g., EX 1, EX 3, CX 4). Because it is unknown whether these X-rays were interpreted for pneumoconiosis or other lung disease, I gave them little weight.

[17] A physician who is a Board-certified radiologist ("BCR") has received certification in radiology of diagnostic roentgenology by the American Board of Radiology, Inc., or the American Osteopathic Board of Radiology. See generally: http://www.answers.com/topic/radiology#after_ad1. A B reader is a physician who has demonstrated proficiency in assessing and classifying X-ray evidence of pneumoconiosis by successful completion of an examination conducted by the National Institute for Occupational Safety and Health (NIOSH). NIOSH is a part of the Centers for Disease Control and Prevention, in the U.S. Department of Health and Human Services. See 42 C.F.R. § 37.51 for a general description of the B reader program.

[18] Dr. Miller's professional credentials are not included in the record. I verified his credentials through use of the American Board of Medical Specialties website, and the website of the National Institute for Occupational Safety and Health (NIOSH). See www.abms.org; and http://www.cdc.gov/niosh/topics/chestradiography/breader-list.html. Per order of February 8, 2006, the parties were informed that the administrative law judge might use the internet to obtain physician qualifications or credentials, and a party who did not provide such credentials was deemed to have waived any objection.

[19] Dr. Simone's qualifications are at EX 16.

					granulomatous disease

It is well established that the interpretation of an X-ray by a B reader may be given additional weight by the fact-finder. Aimone v. Morrison Knudson Co., 8 B.L.R. 1-32, 34 (1985); Martin v. Director, OWCP, 6 B.L.R. 1-535, 537 (1983). The Benefits Review Board has also held that the interpretation of an X-ray by a physician who is a Board-certified radiologist as well as a B reader may be given more weight than that of a physician who is only a B reader. Scheckler v. Clinchfield Coal Co., 7 B.L.R. 1-128, 131 (1984). Additionally, a finder of fact is not required to accord greater weight to the most recent X-ray evidence of record. Rather, the length of time between the X-ray studies and the qualifications of the interpreting physicians are factors to consider. McMath v. Director, OWCP, 12 B.L.R. 1-6 (1988); Pruitt v. Director, OWCP, 7 B.L.R. 1-544 (1984).

Except for one X-ray, dated October 2003, all of the X-ray interpretations presented here involve the Claimant's X-ray of May 19, 2003. A total of six interpretations of that X-ray are offered; four of those six interpretations are negative for pneumoconiosis. The other two interpretations, those of Dr. Ahmed and Dr. Miller, are positive for pneumoconiosis. These interpretations noted the presence of opacities, in profusion 1/0, in all six lung zones. Section 718.202(a)(1) states that a chest X-ray conducted and classified in accordance with § 718.102 may form the basis for a finding of the existence of pneumoconiosis. Section 718.102(b) states that ILO Classifications 1, 2, 3, A, B, or C shall establish the existence of pneumoconiosis. Category 1/0 is ILO Classification 1. The Claimant's October 2003 X-ray was interpreted as negative for pneumoconiosis.

Except for Dr. Bellotte, who is a B reader but not a Board-certified radiologist, all of the physicians who provided opinions are dually qualified: that is, they are Board-certified radiologists as well as B readers. All of the physicians who interpreted the Claimant's X-rays as negative for pneumoconiosis also noted evidence of "granulomas" or "granulomatous disease" on the Claimant's X-rays.

I cannot differentiate between the interpretations of the three dually-qualified physicians who read the Claimant's May 2003 X-ray as negative for pneumoconiosis and the two who interpreted the same X-ray as showing evidence of the disease. All have equivalent professional qualifications. The October 2003 X-ray, interpreted by a dually-qualified physician, was read as negative for pneumoconiosis; similarly, this physician noted evidence of granuloma on that film. Notably, no physician has interpreted the Claimant's X-rays as completely negative. Consequently, the issue is whether the images apparent on the Claimant's X-rays are in fact evidence of pneumoconiosis or whether they are evidence of a separate disease process.

Because the evidence that the Claimant has pneumoconiosis, based upon X-ray, is not greater than the evidence that he does not, I find that the Claimant is unable to establish, by a preponderance of evidence, that he has pneumoconiosis by means of X-ray.

Biopsy or Autopsy Evidence

A determination that pneumoconiosis is present may be based on a biopsy or autopsy. § 718.202(a)(2). The Claimant proffered the record of a bronchoscope with right middle lobe bronchial biopsy, performed in April 2006. The bronchoscope report noted "diffuse chronic inflammation in the airway with candy cane appearance suggestive of chronic bronchitis; and "large amount of thick white mucous in all airways with large amount of mucous plug." The biopsy report noted "pulmonary parenchyma showing mild stromal fibrosis and reactive bronchial epithleial (sic) cells" (CX 4). Accompanying the reports of the bronchoscope and biopsy, Dr. Salam Rajjoub, the Claimant's treating physician, submitted a statement asserting that the Claimant suffers from "moderate to severe COPD [chronic obstructive pulmonary disease] which is a possible result from his black lung" (CX 4).

Regulatory Presumptions

A determination of the existence of pneumoconiosis may also be made using the presumptions described in §§ 718.304, 718.305, and 718.306. Section 718.304 requires X-ray, biopsy, or equivalent evidence of complicated pneumoconiosis, which is not present in this case. Section 718.305 is not applicable because this claim was filed after January 1, 1982. §718.305(e). Section 718.306 applies only in cases of deceased miners who died before March 1, 1978. Since none of these presumptions applies in this case, the existence of pneumoconiosis has not been established under § 718.202(a)(3).

Physician Opinion

The fourth way to establish the existence of pneumoconiosis under § 718.202 is set forth in subparagraph (a)(4): A determination of the existence of pneumoconiosis may also be made if a physician exercising sound medical judgment, notwithstanding a negative X-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in § 718.201. Any such finding shall be based on objective medical evidence such as blood gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

A medical opinion is reasoned if the underlying documentation and data are adequate to support the findings of the physician. Fields v. Island Creek Coal Co., 10 B.L.R. 1-19 (1987). A medical opinion that is unreasoned or undocumented may be given little or no weight. Clark v. Karst-Robbins Coal Co, 12 B.L.R. 1-149 (1989). Generally, a medical opinion is well documented if it provides the clinical findings, observations, facts and other data the physician relied on to make a diagnosis. An opinion based on a physical examination, symptoms, and a patient's work and social histories may be found to be adequately documented. Hoffman v. B. & G Construction Co., 8 B.L.R. 1-65 (1985).

As stated above, the definition in § 718.204(a) of pneumoconiosis includes both medical, or "clinical" pneumoconiosis and statutory, or "legal" pneumoconiosis, which are defined, respectively, in § 718.202(a)(1) and (2). Under these definitions, lung impairments such as chronic bronchitis or chronic obstructive pulmonary disease can be considered to be "legal"

pneumoconiosis, provided they are causally linked to dust exposure in coal mine employment. See generally 65 F.R. 79,920 at 79,938 (Dec. 20, 2000).

Dr. John Bellotte (DX 13, 14, 15, 16, 17)

As noted above, Dr. Bellotte conducted the pulmonary evaluation in conjunction with the Claimant's claim, in May 2003. Dr. Bellotte is Board-certified in internal medicine and pulmonary disease and is a B reader.[20] Dr. Bellotte considered a coal mine employment history of 20 years, including four years underground, and a smoking history of 35 pack years, ending 20 years before. His report reflects that the Claimant told him that he had a history of asthma as a child. In his written report, Dr. Bellotte diagnosed the Claimant with chronic obstructive pulmonary disease, asthma, emphysema, chronic bronchitis, and old granulamatous disease ("OGLD"), and he noted a history of tobacco use. Dr. Bellotte's written report also stated: "No coal dust induced disease…No coal dust related diagnosis," and included additional non-pulmonary diagnoses of "hyperlipedemia," "hard of hearing," "back pain," "seizure disorder," "pain in hip," and "mild obesity." In his report Dr. Bellotte did not state any rationale for his conclusions that the Claimant has no coal-dust related disease, but gave the following causes for the Claimant's pulmonary conditions: tobacco abuse; genetic; cigarettes; infection. Dr. Bellotte also noted that the Claimant's asthma is not well controlled and recommended referral to another physician for treatment (DX 13). In his notes accompanying the Claimant's pulmonary function test, Dr. Bellotte wrote: "Moderately severe obstructive ventilatory impairment. Responsive to bronchodilator medication suggestive of a diagnosis of asthma. Decreased FVC suggests a mild restrictive ventilatory impairment which would have to be confirmed by measuring TLV" (DX 15). In his notes accompanying the Claimant's arterial blood gas test, Dr. Bellotte wrote: "Minimal impairment of pulmonary gas exchange at rest. Normal hemoglobin level. Normal carboxyhemoglobin level" (DX 14).

Dr. Salam Rajjoub (CX 3, 4)

Dr. Rajjoub, who is Board-certified in internal medicine, pulmonary disease and critical care, has been the Claimant's treating physician since March 2005.[21] The Claimant submitted a statement from Dr. Rajjoub, dated March 2006, with accompanying treatment notes (CX 3). Additionally, the Claimant also submitted a "complete medical workup" from Dr. Rajjoub, dated April 2006, which included records of the Claimant's bronchoscopy with biopsy, and medical treatment notes, as well as a written statement from Dr. Rajjoub, dated May 2006 (CX 4).

In his March 2006 statement, Dr. Rajjoub stated that the Claimant has severe chronic obstructive pulmonary disease, and he listed the Claimant's medications. Dr. Rajjoub enclosed a copy of the pulmonary function test, dated March 7, 2006, showing severe impairment. In his April 2006 statement, Dr. Rajjoub wrote that the Claimant "suffers from moderate to severe COPD which is a possible result from his black lung. His lung condition has been exacerbated

[20] I obtained Dr. Bellotte's Board certifications using the internet. See Footnote 18 above relating to notice to the parties regarding this practice.

[21] I obtained Dr. Rajjoub's Board certifications using the internet. See Footnote 18 above relating to advance notice to the parties regarding this practice.

causing excessive dyspnea, wheezing, and cough." These statements constitute the entirety of Dr. Rajjoub's substantive comments regarding the Claimant's condition.

Dr. Rajjoub's treatment notes and medical records reflect regular medical visits from the Claimant, and show Dr. Rajjoub's course of treatment, which included prescription medications. Dr. Rajjoub's treatment notes reflect that the Claimant stopped smoking 12 years before, and smoked one pack per day for 40 years. Records of the Claimant's bronchoscopy and biopsy are summarized above; records of pulmonary function and arterial blood gas testing are summarized below. Dr. Rajjoub's medical records include several narrative X-ray interpretations, at least one of which notes interstitial scarring in the lungs. Another X-ray interpretation notes: "Small granuloma in the right upper lobe is again seen" (CX 4).

Dr. Frank Scattaregia (EX 5)

As noted above, Dr. Scattaregia testified by deposition, and appended to his deposition transcript are his treatment notes and records of medical tests. I disregard his deposition testimony in its entirety, for the reasons set forth above.

Dr. Scattaregia's treatment notes and medical test records reflect that he was treating the Claimant for chronic obstructive pulmonary disease, asthmatic bronchitis, and emphysema, and that bronchodilating medications had been prescribed for the Claimant as far back as November 1998. Dr. Scattaregia's records also reflect that he was treating the Claimant for a seizure disorder and that the Claimant had cardiac impairments as well as respiratory impairments. Based on Dr. Scattaregia's records, the Claimant was reporting increasing difficulty with breathing. Dr. Scattaregia's medical treatment records reflect that the Claimant was observed to have an obstructive pulmonary impairment, but do not discuss the etiology of the impairment.

Dr. Joseph Renn (EX 6, 7, 24, 25)

Dr. Renn is Board-certified in internal medicine and pulmonary disease and is a B reader. He submitted a written report, dated June 2004, which was based on a physical examination of the Claimant in November 2003. Dr. Renn took a medical and work history and examined reports of previous medical tests,[22] but did not himself administer any medical tests, except for an electrocardiogram (EX 6). Dr. Renn's written report is based on coal mine employment of approximately 20 years and a smoking history of one pack a day for about 35 years, ending in 1991, plus several years of pipe smoking. The Claimant told Dr. Renn that he had been diagnosed with asthma, asthmatic bronchitis, and possibly emphysema in the past.

[22] § 725.414(a)(3)(i) states: "Any chest X-ray interpretations, pulmonary function test results, blood gas studies … and physician opinions that appear in a medical report must each be admissible under this paragraph or paragraph (a)(4)[pertaining to hospitalization and treatment records] of this section." Dr. Renn's report includes charts summarizing pulmonary function tests and X-ray interpretations that are not otherwise admissible. To the extent that these charts contain evidence of tests which are not admissible under the regulation, I disregarded them.

In his written report, Dr. Renn diagnosed the Claimant with chronic bronchitis owing to tobacco smoking, asthma, and old pulmonary granulomatous disease, as well as several other non-pulmonary conditions. Dr. Renn wrote that none of the diagnoses were caused by or contributed to by, exposure to coal mine dust, and that the Claimant does not have either clinical or legal pneumoconiosis. However, Dr. Renn did not point to any specific data which caused him to come to this conclusion. Dr. Renn also stated that the Claimant's bronchitis was due to tobacco use, and his asthma was a disease of the general population (EX 6).

Dr. Renn also testified by deposition (EX 24, 25). In his initial deposition session, Dr. Renn testified that he presumed that the Claimant had 20 years of coal mine employment, but based on the Claimant's description of his coal mine work, the Claimant would have had less coal dust exposure than a miner who worked at the mine face. Dr. Renn also testified that the Claimant had a history of childhood asthma. From his review of the Claimant's pulmonary function tests, Dr. Renn inferred that the Claimant had obstructive airway disease and an asthmatic condition, based upon the Claimant's response to bronchodilator medication. Dr. Renn also commented that several of the pulmonary function studies may have invalid results, as to the extent of the Claimant's pulmonary impairments, due to the Claimant's "poor cooperative effort" (EX 24 at 19). Dr. Renn also commented that the Claimant's arterial blood gas studies showed normal gas exchange. Nevertheless, according to Dr. Renn, the Claimant's obstructive airway disease was so severe that he would be impaired to the extent that he could not perform his usual coal mine work (EX 24 at 23). Dr. Renn testified that the Claimant's disabling impairment was a combination of chronic bronchitis, from cigarette smoking, and his asthma. He also stated that he disagreed with Dr. Rajjoub's conclusion that the Claimant had COPD due to black lung, because of the reversible nature of the Claimant's airway obstruction would not be consistent with black lung disease (EX 24 at 25). On cross-examination, Dr. Renn stated that COPD consisted of several components, and generally included chronic bronchitis and emphysema (EX 24 at 26). He clarified that he understood the Claimant's last coal mine employment to involve operating an end loader (EX 24 at 33).

Dr. Renn's deposition was continued at a second session several weeks later (EX 25). At that session, on cross-examination by the Claimant's personal representative, Dr. Renn reiterated his diagnoses of the Claimant (chronic bronchitis and asthma), and stated that the Claimant's granulomas were not part of his breathing problems (EX 25 at 7-8).

Dr. James Castle (EX 17, 20, 21, 23)

Dr. Castle is Board-certified in internal medicine and pulmonary disease and is a B reader. He submitted a report in October 2005 based upon his review of medical records pertaining to the Claimant. In his report, Dr. Castle summarized medical records, including treatment records, dating back past 1986, as well as Dr. Bellotte's and Dr. Renn's reports. Dr. Castle concluded that the Claimant did not have coal workers' pneumoconiosis. He presumed that the Claimant had a coal mine employment history of at least 20 years, and concluded that such exposure did constitute a risk factor for coal workers' pneumoconiosis. Dr. Castle identified tobacco use as another risk factor for pulmonary disease, and concluded that the Claimant's 40-pack year smoking history was a sufficient history to cause the development of lung and cardiovascular diseases, if the Claimant were susceptible. Dr. Castle noted also that the

Claimant had a significant history of cardiovascular disease and had reported a history of asthma. Based on the pulmonary function studies, Dr. Castle concluded that the Claimant had tobacco smoke induced airway obstruction and bronchial asthma, which were not due to coal mine dust (EX 20).

Dr. Castle also testified by deposition. In his deposition, he reiterated the conclusions he set out in his report. He discussed the diagnosis of asthma, and noted that the medical records he reviewed indicated that the Claimant had been diagnosed with asthma in his youth. He also noted that persons with asthma tend to respond to bronchodilation in pulmonary function testing, and that the records he examined indicated that, on at least two occasions, the Claimant had a bronchodilator response. Dr. Castle also discussed granulomatous disease, and noted that Dr. Bellotte had diagnosed the Claimant with old granulomatous disease. According to Dr. Castle, the Claimant had evidence of emphysema, a history of bronchial asthma, and a somewhat reversible airway obstruction; in the absence of X-ray evidence or evidence of irreversible obstruction and restriction, the Claimant's lung condition was most likely due to cigarette smoking (EX 23).

Discussion

With the possible exception of Dr. Rajjoub, no physician who rendered a report concluded that the Claimant had coal workers' pneumoconiosis. Dr. Rajjoub's medical report states that the Claimant's chronic obstructive pulmonary disease is caused by his "black lung," but gives no additional explanation for how he arrived at this conclusion (CX 4).

The consensus of the physician opinions, however, is that the Claimant has significant respiratory impairments. According to Dr. Bellotte, these impairments are chronic obstructive pulmonary disease, asthma, emphysema, and chronic bronchitis (DX 13). Dr. Rajjoub concluded that the Claimant had severe chronic obstructive pulmonary disease (CX 3, 4). Dr. Renn determined that the Claimant had chronic bronchitis (EX 6). Dr. Castle diagnosed the Claimant with airway obstruction and bronchial asthma (EX 20). Several of these physicians -- Dr. Bellotte and Dr. Renn, for example -- also remarked that the Claimant had physical evidence of old granulomatous lung disease. Most of the radiologists who interpreted the Claimant's X-rays also remarked on the evidence of granulomas in the Claimant's X-ray films.

The difference in nomenclature employed by the physicians in describing the Claimant's condition is of little importance. Dr. Bellotte noted COPD as well as the component conditions of asthma, emphysema, and chronic bronchitis. As Dr. Renn explained in his deposition, the term "chronic obstructive pulmonary disease" is a catch-all term, and it most often means that an individual has two respiratory ailments: chronic bronchitis and emphysema. All of the physicians noted an asthmatic component to the Claimant's condition. Although Dr. Renn did not specifically diagnose the Claimant with COPD, he did note that the Claimant demonstrated symptoms consistent with asthma.

In addition to being virtually unanimous in opining that the Claimant has serious respiratory impairments, the physicians (again with the exception of Dr. Rajjoub) also consistently conclude that the Claimant's respiratory impairments were caused by smoking, and

not by coal dust inhalation. Interestingly, in making this assessment, the physicians generally credited the Claimant with approximately 20 years of coal mine dust exposure based on his asserted coal mine employment history, which is far more than has been established based on the record. As noted above, I have found that the Claimant's years of coal mine employment do not approach 20 years.[23]

In general, Dr. Bellotte, Dr. Renn, and Dr. Castle do not explain the basis for their conclusions in their written reports. Dr. Bellotte does not explain why he thinks there is no coal dust related impairment. Consequently, I give his conclusion in that regard little weight. I do, however, give appropriate weight to Dr. Bellotte's diagnoses, because they are based on objective medical test results. As a Board-certified pulmonary specialist, Dr. Bellotte has the appropriate medical credentials to make these diagnoses.

In their deposition testimony, Dr. Renn and Dr. Castle explain the basis for their determinations. Both of these physicians, who are Board-certified pulmonary specialists, rely on evidence of pulmonary function testing showing that the Claimant's obstructive ventilatory defect is at least somewhat reversible, suggesting to them an asthmatic condition rather than a condition causally linked to coal mine dust exposure. I find that their conclusions are well-reasoned and, consequently, I give these physicians' conclusions appropriate weight.

The only physician to conclude that the Claimant's condition may be related to dust exposure is Dr. Rajjoub. Dr. Rajjoub is extremely well qualified to make a well-informed determination in the Claimant's case: he is Board-certified in pulmonary medicine, and in addition he has been the Claimant's treating physician for more than five years. His diagnosis that the Claimant has chronic obstructive pulmonary disease is unequivocal, and it supported by the evidence (in this case, Dr. Rajjoub's treatment records, which include multiple pulmonary function tests). I find Dr. Rajjoub's conclusion to be well-reasoned.

Nevertheless, Dr. Rajjoub does not conclude definitively that there is a relationship between the Claimant's condition and coal mine dust exposure. The lung biopsy, summarized above, conducted under Dr. Rajjoub's supervision, does not establish that the Claimant has pneumoconiosis. These results do tend to establish that the Claimant has significant pulmonary impairments, however, including chronic bronchitis. In stating that the Claimant's pulmonary condition is a "possible result" from black lung, Dr. Rajjoub is, at best, making an equivocal statement. Considering this physician's breadth of knowledge of pulmonary medicine, and that his specific basis of knowledge concerning the Claimant is unmatched, the fact that Dr. Rajjoub is unable to make a definitive link between coal dust exposure and the Claimant's pulmonary condition leads me to conclude that no link can be established.

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[23] I have found that the Claimant has 8.59 years of coal mine employment. It may in fact be possible that the Claimant could establish that his employment with A.G. Trusler Trucking and his self-employment, in the years between 1951 and 1959, constitutes coal mine employment, but, as noted above, the evidence of record is insufficient for me to make such a determination. However, even if it is presumed that the entire decade of the 1950s constitutes coal mine employment, the Claimant is short of 20 years of coal mine dust exposure based on his employment history.

Based on the weight of all of the evidence pertaining to the Claimant's pulmonary impairment, I find that the Claimant is unable to establish that he has pneumoconiosis, within the definition of the regulation. See Bailey v. Consolidation Coal Co., BRB No. 05-0324 BLA (Sept. 30, 2005). The X-ray evidence of coal workers' pneumoconiosis is not well-established; the only physician to even suggest that the Claimant may have pneumoconiosis is Dr. Rajjoub, and his conclusion in this regard is equivocal. The Claimant has presented X-ray evidence from two dually-qualified physicians (Board-certified radiologists and B readers) who interpret his X-ray of May 2003 as positive for pneumoconiosis. However, at least one other dually-qualified physician has interpreted that same X-ray as evidencing that the Claimant has some type of granuloma in his lungs, which provides an explanation for why his chest X-rays show abnormalities. Moreover, the Claimant's other X-rays, when interpreted by dually-qualified physicians, also show evidence of granulomas.

Due to the evidence that the Claimant has chronic obstructive pulmonary disease, chronic bronchitis, and/or asthma, I have also considered whether the Claimant has established that he has "legal" pneumoconiosis." However, as set forth in the regulation at § 718.201, these conditions constitute "legal" pneumoconiosis only if a causal link between these conditions and dust exposure in coal mine employment is established. The physicians who rendered opinions in this regard concluded that there was no such link, and based their assessment on far more years of coal mine employment than the Claimant has established. Consequently, I conclude that the Claimant is unable to establish that his condition falls within the regulation's definition of pneumoconiosis.

Based on the foregoing, and my analysis of all the evidence, I find that the Claimant is unable to establish, by a preponderance of evidence, that he has pneumoconiosis. Island Creek Coal Co. v. Compton, 211 F.3d 203 (4th Cir. 2000).

b. Whether the Pneumoconiosis "Arose out of" Coal Mine Employment

Under the governing regulation, a miner who was employed for at least ten years in coal mine employment is entitled to a rebuttable presumption that pneumoconiosis arose out of coal mine employment. § 718.203(b). However, where a miner has established less than ten years of coal mine employment history, "it shall be determined that such pneumoconiosis arose out of that employment only if competent evidence establishes such a relationship." § 718.203(c). In this case, where the Claimant has established 8.59 years of coal mine employment, the miner is unable to benefit from the rebuttable presumption. Consequently, the burden remains on the Claimant to establish a link between his condition and his coal mine employment.

As summarized above, the weight of the evidence establishes that the Claimant's pulmonary impairments are not related to his coal mine employment, but rather are causally connected to his long history of smoking, and possibly to a long personal history of asthma, which pre-dates his coal mine employment. The Claimant has a smoking history of 35 to 40 pack-years or more, and quit smoking well after he ended his coal mine employment. His pulmonary conditions – chronic obstructive pulmonary disease and chronic bronchitis – are

linked to smoking. He reported a history of asthma as a child, and he evidences asthmatic symptoms at present.

Based on the foregoing, therefore, even if the Claimant were entitled to employ the rebuttable presumption, I find that any presumption that the Claimant's condition arose from coal mine employment is rebutted successfully.

c. Whether the Claimant is Totally Disabled

The Claimant bears the burden to establish that he is totally disabled due to a respiratory or pulmonary condition. Section 718.204(b)(1) states that a miner shall be considered totally disabled "if the miner has a pulmonary or respiratory impairment which, standing alone, prevents or prevented the miner: (i) from performing his or her usual coal mine work; or (ii) from engaging in gainful employment … requiring the skills and abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity over a substantial period of time." Nonpulmonary and nonrespiratory conditions which cause an "independent disability unrelated to the miner's pulmonary or respiratory disability" shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis. § 718.204(a). See also Beatty v. Danro Corp., 16 B.L.R. 1-11 (1991).

The regulation provides that, in the absence of contrary probative evidence, the following may be used to establish a miner's total disability: pulmonary function tests with values below a specified threshold; arterial blood gas tests with results below a specified threshold; a finding of pneumoconiosis with evidence of cor pulmonale with right-sided congestive heart failure. § 718.204(b)(2)(i)(ii) and (iii). Where the above do not demonstrate total disability, or appropriate medical tests are contraindicated, total disability may nevertheless be established if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in his usual coal mine employment. § 718.204(b)(2)(iv).

Pulmonary Function Tests

In order to demonstrate total respiratory disability on the basis of the pulmonary function tests, the studies must, after accounting for gender, age, and height, produce a qualifying value for the forced expiratory volume [FEV_1] test and at least one of the following: a qualifying value for the forced vital capacity [FVC] test; a qualifying value for the maximum voluntary volume [MVV] test; or a value of the FEV_1 divided by the FVC that is less than or equal to 55%. § 718.204(b)(2)(i). "Qualifying values" for the FEV_1, FVC, and the MVV tests are results measured at less than or equal to the values listed in the appropriate tables of Appendix B to Part 718.

The record in this matter contains the following pulmonary function test results (where two values are given, the second value reflects results after bronchodilator use):

Date of Test	Physician	FEV_1	FVC	MVV	FEV_1/FVC ratio	Valid ?
08/07/1986	unknown	3.45	4.94	unk	70%	No[24]
05/01/2000	Scattaregia	1.38	2.76	unk	50%	No [25]
06/26/2001	Scattaregia	1.30	2.60	unk	50%	No
05/19/2003	Bellotte	1.31/1.47	2.51/2.83	37/43	52%/52%	Yes[26]
06/17/2003	Scattaregia	1.27	2.85	unk	45%	No
10/28/2003	Scattaregia	1.34	2.53	37	53%	Yes[27]
02/10/2005	Rajjoub	1.27/1.45	3.56/3.46	N/A	36%/42%	No[28]
04/25/2005	Rajjoub	1.46/1.46	3.22/2.94	N/A	45%/50%	No
09/22/2005	Rajjoub	1.50/1.64	3.52/3.79	N/A	43%/43%	No
03/07/2006	Rajjoub	.99/1.15	2.32/2.77	N/A	42%/41%	No

In order to demonstrate total respiratory disability on the basis of the pulmonary function tests, the studies must, after accounting for gender, age, and height, produce a qualifying value for the forced expiratory volume [FEV_1] test and at least one of the following: a qualifying value for the forced vital capacity [FVC] test; a qualifying value for the maximum voluntary volume [MVV] test; or a value of the FEV_1 divided by the FVC that is less than or equal to 55%. § 718.204(b)(2)(i). "Qualifying values" for the FEV_1, FVC, and the MVV tests are results measured at less than or equal to the values listed in the appropriate tables of Appendix B to Part 718.

The Claimant was born in October 1930. Therefore, he was between 69 and 75 years old at the time the tests conducted between 2000 and 2006 were administered.[29] According to the pulmonary function test records, he was measured at various heights – 68, 69, and 70 inches. Taking the median of these heights, 69 inches, the qualifying FEV_1 value is as follows: at age 69, 1.82; at age 70, 1.80; at age 71 and above, 1.79. Qualifying FVC values for that height are as follows: at age 69, 2.35; at age 70, 2.33; at age 71 and above, 2.31. Qualifying MVV values for that height are as follows: for age 69, 73; for age 70, 72; for age 71 and above, 72.

Based on the foregoing, it is evident that the Claimant obtained qualifying FEV_1 values and also obtained qualifying FEV_1/FVC ratios, with or without bronchodilation. His FEV_1 values generally ranged between 1.00 and 1.50, and his ratios consistently were under 55%.

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[24] Only two flow-volume loops are included in the record. See § 718.103(b).

[25] Dr. Scattaregia's tests were administered for medical treatment purposes. Flow-volume loops are not included in the record.

[26] Flow-volume loops are incomplete, but the physician observed a moderately severe obstructive ventilatory impairment.

[27] This test was administered for medical treatment purposes. Flow-volume loops were included in the record.

[28] All of Dr. Rajjoub's tests consisted of only two trials, one prior to bronchodilation and one after bronchodilation medication. These tests were conducted by a treating physician, and may have been administered for medical treatment.

[29] I did not consider the record of the 1986 pulmonary function test, because the Claimant's condition 15 years before he submitted his claim is of little relevance to his current condition.

Although some of the tests are of unknown validity, it is notable that the values the Claimant obtained in these tests are consistent with the values obtained in the tests that are valid.[30]

I am not limited to considering only pulmonary function tests that have been determined to be valid: that is, that they meet all of the requirements set out in § 718.103 and Appendix B to Part 718. As Appendix B states, "If it is established that one or more standards have not been met, the claims adjudicator may consider such fact in determining the evidentiary weight to be given to the results of the ventilatory function tests." Notably, all of the Claimant's pulmonary function tests, between 2000 and 2006, show similar results. The consistency of the test results leads me to conclude that the results are reliable.[31]

Arterial Blood Gas Tests

A Claimant may also establish total disability based upon arterial blood gas tests. The record contains the following arterial blood gas test results:

Date of Test	Physician	PCO_2	PO_2	PCO_2 (post-exercise)	PO_2 (post-exercise)
08/07/1986	unknown	32.9	83.1	36.8	68.3
05/19/2003	Bellotte	36.7	67.6	Not done	Not done [32]
10/28/2003	Scattaregia	30.5	73.3	Not done	Not done

In order to establish total disability, the test must produce a qualifying value, as set out in Appendix C to Part 718. § 718.204(b)(2)(ii). Appendix C lists values for percentage of carbon dioxide [PCO_2] and percentage of oxygen [PO_2], based upon several gradations of altitudes above sea level. At a specified gradation (e.g., 2999 feet above sea level or below), and PCO_2 level, a qualifying value must be less than or equivalent to the PO_2 listed in the table.

[30] In fact, the Employer introduced an opinion from Dr. Castle, in which Dr. Castle asserts that the Claimant's May 2003 pulmonary function tests are not valid, because the Claimant did not exert maximum effort, obstructed the mouthpiece, etc. (EX 17).

[31] The Employer points out that the Claimant did not permit Dr. Renn to administer a bronchodilator medication, and so Dr Renn did not conduct pulmonary function testing (See EX 6, 24). Nevertheless, Dr. Renn executed a medical report, based upon a physical examination, a medical and work history, and records that Dr. Renn reviewed. I find that the Employer suffered no prejudice based on any inability to complete testing that Dr. Renn may have wished to conduct.

[32] An exercise blood gas test shall be offered unless medically contraindicated. § 718.105(b). The record of this test states that the Claimant has a history of seizure disorder (DX 14). Under the circumstances described in the record, where the Claimant had medical conditions of a non-pulmonary nature that made exercise inadvisable, I find that an exercise blood gas test was contraindicated.

Dr. Bellotte administered the test at an altitude below 2999 feet. Likewise, the test that Dr. Scattaregia administered was done at an altitude below 2999 feet.[33] For the first test, in which a PCO_2 value of 36.7 was recorded, the qualifying PO_2 value must be less than 63. For the second test, in which a PCO_2 value of 30.5 was recorded, the qualifying PO_2 value must be less than 69.

Based on the foregoing, the Claimant did not obtain values on the arterial blood gas tests that would establish that he is totally disabled.

Cor Pulmonale

A miner may demonstrate total disability with, in addition to pneumoconiosis, medical evidence of cor pulmonale with right-sided congestive heart failure. § 718.204(b)(2)(iii). As stated above, I did not find that the Claimant had established the existence of pneumoconiosis. Moreover, there is no evidence of cor pulmonale with right sided congestive heart failure.

Physician Opinion

The final method of determining whether the Claimant is totally disabled is through the reasoned medical judgment of a physician that the Claimant's respiratory or pulmonary condition prevents him from engaging in his usual coal mine work or comparable gainful employment. Such an opinion must be based on medically acceptable clinical and laboratory diagnostic techniques. § 718.204(b)(2)(iv). A reasoned opinion is one that contains underlying documentation adequate to support the physician's conclusions. Field v. Island Creek Coal Co., 10 BLR 1-19, 1-22 (1987). Proper documentation exists where the physician sets forth the clinical findings, observations, facts and other data on which he bases his diagnosis. An unreasoned or undocumented opinion may be given little or no weight. Clark v. Karst-Robbins Coal Co., 12 BLR 1-149, 1-155 (1989).

In his written report, Dr. Bellotte stated "no coal dust induced impairment" and remarked that the Claimant was disabled by his seizure disorder, back problems, and COPD. Dr. Bellotte did not remark on whether the Claimant was able to work in coal mine employment (DX 13). On the issue of whether the Claimant was disabled, Dr. Rajjoub stated only that the Claimant "has a limited activity level due to his lung condition," and made no other comments (CX 3). In his written report and in his deposition testimony, Dr. Renn concluded that the Claimant was totally disabled from his last coal mine employment (which Dr. Renn defined as truck driver or end loader operator) (EX 6).

In his written report, Dr. Castle concluded that the Claimant was permanently and totally disabled from a respiratory perspective, in that he would be unable to perform his last coal mine employment duties. Additionally, Dr. Castle concluded that the Claimant's disability was due to his tobacco smoke induced chronic airway obstruction and asthmatic bronchitis, neither of which

[33] I did not consider the results of the 1986 arterial blood gas test because the Claimant's condition 15 years prior to the filing of his current claim is too remote to be relevant to his condition at the time the claim was initiated.

was related to coal mine dust exposure. Dr. Castle also noted that it was possible that the Claimant's seizure disorder and cardiac disease could be disabling (EX 20). In his deposition testimony, Dr. Castle clarified that he understood the Claimant's last coal mine employment duties to be mobile equipment operator, possibly end-loader operator, and security guard. Dr. Castle also summarized the Claimant's cardiac condition and noted that the Claimant "had evidence of very significant coronary artery disease" (EX 23 at 14).

As noted above, the results of the Claimant's pulmonary function tests are sufficient for him to establish that he is totally disabled, within the definition of the applicable regulation. § 718.204(b). Moreover, Dr. Renn and Dr. Castle, who were the only physicians who gave opinions as to whether the Claimant was disabled, unequivocally stated that he did not have the capacity to continue to work at his last coal mine employment. As is clear from their deposition testimonies, these physicians took into consideration the fact that the Claimant's last coal mine employment involved operating machinery, such as an end loader.

Based on the foregoing, I find that the Claimant has established, by a preponderance of evidence, that he is totally disabled due to his pulmonary impairment. I make this determination based upon the consistent results of his pulmonary function testing as well as the assessments of those physicians who gave opinions on the issue. I note that no physician has asserted that the Claimant is not disabled.

d. Whether the Claimant's disability is Due to Pneumoconiosis

Lastly, the Claimant must establish that he is totally disabled due to pneumoconiosis. This element is fulfilled if pneumoconiosis, as defined in § 718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. § 718.204(c); Lollar v. Alabama By-Products Corp., 893 F.2d 1258, 1265 (11th Cir. 1990); Island Creek Coal Co. v. Compton, 211 F.3d 203, 207 (4th Cir. 2000). The regulations provide that pneumoconiosis is a "substantially contributing cause" of the miner's disability if it (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment. The fact that an individual suffers or suffered from a totally disabling respiratory or pulmonary impairment is generally not, in itself, sufficient to establish that the impairment is, or was, due to pneumoconiosis. § 718.204(c)(2). A claimant can establish this element through a physician's documented and reasoned medical report. §718.204(c).

As noted above, the weight of the medical evidence is that the Claimant's disabling lung condition is not related to coal mine employment, but rather is caused by smoking. The only physician to even suggest that there is a link between the Claimant's pulmonary condition and coal mine employment, Dr. Rajjoub, did not state that the Claimant was totally disabled. Rather, Dr. Rajjoub concluded that the Claimant's condition caused a "limited activity level" (CX 3).

Therefore, I find that the Claimant is unable to establish, by a preponderance of the evidence, that his disability is due to pneumoconiosis.[34]

IV. CONCLUSION

Based upon applicable law and my review of all of the evidence, I find that the Claimant has not established his entitlement to benefits under the Act.

V. ATTORNEY'S FEE

The award of an attorney's fee is permitted only in cases in which a Claimant is found to be entitled to benefits under the Act. Because benefits were not awarded in this Claim, the Act prohibits the charging of any fee to the Claimant for representation services rendered in pursuit of the Claim.

VI. ORDER

The Claimant's Claim for benefits under the Act is DENIED.

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Adele H. Odegard
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the

[34] The regulation also provides that any nonpulmonary or nonrespiratory condition or disease, which causes an independent disability unrelated to the pulmonary or respiratory disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis. § 718.204(a). Dr. Castle commented that the Claimant's cardiac condition and seizure disorder also contribute to his disability. Notably, Dr. Castle's assessment was conducted after the Claimant's heart-related hospitalization in September 2004, so his assessment was based in part on the records of his treatment at that time (See EX 20). However, as noted above, I find that Dr. Castle's comments clearly indicate his conclusion that the Claimant is totally disabled based upon his pulmonary impairment alone.

date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).